Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CEMEX, S.A.,

Petitioner,

v.

UNITED STATES OF AMERICA,
AD HOC COMMITTEE OF AZ-NM-TX-FL
PRODUCERS OF GRAY PORTLAND CEMENT,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

By failing to object to a then controlling judicial decision, does a party waive application of a subsequent reversal of that decision?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner, CEMEX, S.A., states that it has no parent corporation. CEMEX does have a number of subsidiaries worldwide. These subsidiaries (except wholly-owned subsidiaries) are set forth in Appendix K.

The respondents in this case are the United States Department of Commerce, Defendant-Appellee below, and The Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement, Plaintiff-Appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, CEMEX, S.A., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit entered in this case.

OPINIONS BELOW

The judgment of the U.S. Court of Appeals for the Federal Circuit in *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, Appeal No. 95-1485 (Fed. Cir. 1996), is reprinted at Appendix A. The Order of the Court of Appeals denying Petitioner's petition for rehearing is reprinted at Appendix B. The decisions below of the U.S. Court of International Trade, Slip Op. 95-125 (Ct. Int'l Trade July 12, 1995), Slip Op. 95-91 (Ct. Int'l Trade May 15, 1995), and 865

F.Supp. 857 (Ct. Int'l Trade 1994), are reprinted at Appendices C, D and E. The Commerce Department Final Determination published in the *Federal Register at* 58 Fed. Reg. 6113 (1993) is reprinted at Appendix F.

JURISDICTION

The judgment of the Court of Appeals was entered on August 1, 1996. The Court of Appeals denied Petitioner's petition for rehearing on October 7, 1996. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

The following statutory provisions are relevant to this case and are set out in Appendix J: 19 U.S.C. § 1675 (agency reviews under Antidumping Duty Orders), and 19 § U.S.C. 1516a (judicial review of final agency determinations).

STATEMENT OF THE CASE

The facts of this case arise under the U.S. antidumping statute.[1] This statute provides that the Department of Commerce ("Commerce") is to conduct an annual review of the amount of antidumping duties due on imports of a product covered by an Antidumping Duty Order.[2] The statute also requires that, within directed time frames, Commerce publish its Final Determination of its results of the review in the *Federal Register*. An interested party then has 30 days from the date of *Federal Register* publication to seek judicial review of this Final Determination.[3] This judicial review is conducted by the U.S. Court

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[1] Trade Agreements Act of 1979, Pub. Law 96-38, 93 Stat. 162 *et seq.* (1979), *as amended, codified at* 19 U.S.C. § 1673 *et seq.*

[2] 19 U.S.C. § 1675(a)(1).

[3] 19 U.S.C. § 1516a(a)(1).

of International Trade ("CIT")[4] and the United States Court of Appeals for the Federal Circuit ("CAFC").[5] The relevant standard of judicial review is that Commerce's Final Determination must be affirmed unless it is found to be "contrary to law."[6]

On April 28, 1993, Commerce published its Final Determination in an annual review of imports covered by Antidumping Duty Order for cement from Mexico.[7] An important part of the calculations in Commerce's Final Determination involved the method of adjusting for Mexico's Value-Added Tax ("VAT"). In its Final Determination, Commerce made this adjustment using what has become known as the *Federal-Mogul* methodology.

Another interested party appealed Commerce's Final Determination to the CIT arguing that Commerce's use of the *Federal-Mogul* methodology was not in accordance with law. While this appeal was pending before the CIT, the CIT examined the issue of antidumping adjustments for VAT in the context of an appeal from a Commerce Department Final Determination under a different Antidumping Duty Order, involving anti-friction bearings from Japan. In the *Anti-Friction Bearing* case, the CIT held that Commerce's use of the *Federal-Mogul* methodology was not in accordance with law,[8] but that an alternative methodology, which has become known as the *Torrington* methodology, was in accordance with law.[9]

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[4] 28 U.S.C. § 1581(c).

[5] 28 U.S.C. § 1295(a)(5).

[6] 19 U.S.C. § 1516a(b).

[7] 58 Fed. Reg. 6113 (1993), Appendix F.

[8] *Federal-Mogul Corp. v. United States*, 834 F. Supp. 1391 (Ct. Int'l Trade 1993) (*"Federal-Mogul I"*).

[9] *Torrington Co. v. United States*, 832 F. Supp. 379 (Ct. Int'l Trade 1993), *aff'd* 853 F. Supp. 446 (Ct. Int'l Trade 1994), *aff'd* 866 F. Supp. 581 (Ct. Int'l Trade 1994) (*"Torrington"*).

In the wake of its VAT decisions in the *Japanese Anti-Friction Bearings* case, the CIT subsequently held that Commerce's use of the *Federal-Mogul* VAT methodology in its Final Determination in the *Mexican Cement* case was not in accordance with law. It remanded the case to Commerce and ordered Commerce to use instead the *Torrington* methodology.[10] CEMEX did not initially object to the CIT's order that the *Torrington* methodology be used, but subsequently argued to Commerce and to the CIT that modifications were necessary to the *Torrington* methodolgy. The CIT held that this argument was untimely and affirmed Commerce's remand results in which, as ordered, Commerce had substituted the *Torrington* methodology for *Federal-Mogul* methodology.[11]

CEMEX appealed to the CAFC. Shortly after CEMEX commenced its appeal, the CAFC overturned the CIT's decision in *Federal-Mogul I* and held that the *Federal-Mogul* methodology was in accordance with law.[12] Commerce immediately returned to use of the *Federal-Mogul* methodology in all subsequent cases,[13] including the

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[10] *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 865 F. Supp. 857 (Ct. Int'l Trade 1994), Appendix E at 38a.

[11] *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 19 CIT ——, Slip Op. 95-91 (May 5, 1995), Appendix D; *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 19 CIT ——, Slip Op. 95-125 (July 12, 1995), Appendix C.

[12] *Federal-Mogul Corp. v. United States*, 63 F.3d 1572 (Fed. Cir. 1995) ("*Federal-Mogul II*").

[13] *See, e.g., Tapered Roller Bearings from Japan and Parts Thereof from Japan*, 61 Fed. Reg. 57,629, 57,646 (1996); *POS Cookware from Mexico*, 61 Fed. Reg. 54,616, 54,617 (1996); *Certain Cold Rolled Steel Flat Products From the Netherlands*, 61 Fed. Reg. 48,465; *Granular PTFE Resin from Italy*, 61 Fed. Reg. 25,195, 25,196 (1996); *DRAM's from Korea*, 61 Fed. Reg. 20,216 (1996); *Certain Corrosion Resistant Carbon Steel Flat Products from Korea*, 61 Fed. Reg. 18,547, 18,548 (1996); *Certain Cut To Length*

Japanese Anti-friction Bearings case,[14] but one.

The one exception in this case. In its brief to the CAFC regarding this issue, Commerce said that (i) it believed that CEMEX waived "any" objection to Commerce's application of the *Torrington* methodology, but that (ii), if the courts found otherwise, Commerce would apply the *Federal-Mogul* methodology used in its Final Determination.[15]

In its decision, *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement*, CAFC Appeal No. 95-1485 (Fed. Cir. 1996), the CAFC began by noting that it applies anew the statutory standard of review set forth in 19 U.S.C. § 1516a(b). *Ad Hoc Comm.* No. 95-91, Slip Op. at 3; Appendix A at 3a. It then found that CEMEX had an obligation to raise "any objection it may have had" to use of the of *Torrington* when the CIT deemed proper, and that, by failing to timely object,

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Carbon Steel Plate from Sweden, 61 Fed. Reg. 15,772, 15,775 (1996); *Certain Corrosion Resistant Carbon Steel Flat Products from Canada*, 61 Fed. Reg. 13,825 (1996); *Elemental Sulfur from Canada*, 61 Fed. Reg. 45,9937 (1996); *Carbon Steel Plate from Germany*, 61 Fed. Reg. 13,845 (1996); *Color Television Receivers from Korea*, 61 Fed. Reg. 4,408, 4,412 (1996); *Brass Sheet and Strip from Canada*, 61 Fed. Reg. 1,560 (1996); *Brass Sheet and Strip from the Netherlands*, 61 Fed. Reg. 1324, 1326 (1996); *Certain Cold Rolled Carbon Steel Flat Products from Germany*, 60 Fed. Reg. 65,264, 65,273 (1995); *Certain Cold Rolled Flat Products from Korea*, 60 Fed. Reg. 63,499, 63,504 (1995); *Porcelain-on-Steel Cookware from Mexico*, 60 Fed. Reg. 58,044 (1995).

[14] Based on a request from Commerce to be allowed to return to use of the *Federal-Mogul* methodology, the CIT vacated its earlier decision affirming use of the *Torrington* methodology. *Torrington Co. v. United States*, Slip. Op. 96-9 (Ct. Int'l Trade, January 4, 1996).

[15] Brief for Government at 7, n.2, *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, Appeal No. 95-1485, reprinted as Appendix I at 92a.

CEMEX "waived its right" to seek a return to the *Federal-Mogul* methodology used in Commerce's Final Determination. *Id.* at 5-6; Appendix A at 4a.

REASONS FOR GRANTING THE WRIT

At bottom, the CAFC's decision stands for the proposition that a party, by failing to object to a then controlling judicial decision, waives the application of a subsequent reversal of that decision. This proposition is contrary to the decisions of other Circuit Courts and to the teachings of this Court. If left to stand, this decision will deny to CEMEX, and could deny to other parties, the benefit of subsequent controlling precedent. This Court should thus resolve this important federal question by reversing the CAFC's decision.

I. COMMERCE'S USE OF THE *FEDERAL-MOGUL* METHODOLOGY IN ITS APRIL 28, 1993 FINAL DETERMINATION MUST BE AFFIRMED UNLESS IT IS CONTRARY TO LAW.

The first issue here is the subject of and standard for judicial review. The answer to this issue is clearly found in the statute. The subject of judicial review is Commerce's Final Determination of April 28, 1993 and specifically Commerce's decision contained in it to use the *Federal-Mogul* methodolgy. 19 U.S.C. § 1516a(a) provides that only Final Determinations of annual reviews are subject to judicial review. 19 U.S.C. § 1675(a) provides that a Final Determination must: (i) contain Commerce's results of its completed annual review; (ii) be issued pursuant to statutorily directed time frames; and (iii) be published in the Federal Register. Commerce's April 28, 1993 Final Determination met these requirements. Specifically, it: (i) contained the results of Commerce's completed annual review under the *Mexican Cement* Antidumping Duty Order, and specifically its decision to use the *Federal-Mogul* VAT methodology; (ii) was issued pursuant to the statutorily directed time frames; and (iii) was published in the Federal Register.

Conversely, Commerce's inclusion of the *Torrington* methodology in its June 1995 court-ordered remand results is not the correct subject of judicial review.[16] The inclusion of the *Torrington* methodology in the June 1995 court-ordered remand results was not a determination made within the statutorily directed time frame—that determination (the April 28, 1993 Final Determination using the *Federal-Mogul* methodology) was made more than two years earlier. The June 1995 remand results using the *Torrington* methodology were never published in the *Federal Register*. Finally, and most importantly, the use of the *Torrington* methodology in the June 1995 remand did not represent *Commerce's* final results of its annual review. *Commerce's* results are set forth in its April 28, 1993 Final Determination where it uses the *Federal-Mogul* methodology. Commerce has specifically confirmed that, if the "waiver" bar is lifted, it will use the *Federal-Mogul* methodology used in its April 28, 1993 Final Determination.[17] Thus, rather than reflecting Commerce's own determination, the use of the *Torrington* methodology in the June 1995 remand results represents the *CIT's* views on what methodology should be used. It was the CIT which ordered Commerce to forego use of the *Federal-Mogul* methodology which Commerce had used in its Final Determination and to use instead the *Torrington* methodology.

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[16] Pursuant to CIT remand orders, Commerce issued unpublished remand results in September, 1994 and June, 1995. These results are set forth in Appendices G and H.

[17] *See* footnote 15, *supra*. Commerce could hardly say otherwise since it has uniformly used the *Federal-Mogul* methodology since the CIT's prohibition against its use was lifted by the CAFC. *See* cases cited at footnote 13, *supra*. In light of these cases, for Commerce to adopt an inconsistent approach in the CEMEX case alone would be arbitrary and capricious. *See Saha Thai Stell Pipe Co. v. United States*, 879 F. Supp. 1331, 36 (Ct. Int'l Trade 1995); *Shikoku Chemical Corp. v. United States*, 795 F. Supp. 417, 421-22 (Ct. Int'l Trade, 1992).

Finally, 19 U.S.C. § 1516a(b) provides in relevant part that a decision contained in the Final Determination (*i.e.*, the use of the *Federal-Mogul* methodology contained in the April 28, 1993 Final Determination) must be affirmed by the CAFC unless it is contrary to law. *See, e.g., Torrington Co. v. United States*, 82 F.3d 1039, (Fed. Cir. 1996); *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994); *PPG Industries v. United States*, 978 F.2d 1232, 1236 (Fed. Cir. 1992).

II. THE "LAW" HERE INCLUDES THE CAFC'S DECISION HOLDING THAT THE *FEDERAL-MOGUL* METHODOLOGY IS IN ACCORDANCE WITH LAW.

The next issue is whether the "law" which this CAFC panel was to apply in this case included a decision of another CAFC panel—namely the CAFC decision in *Federal-Mogul II* upholding the *Federal-Mogul* methodology. The answer to this issue is clear. It is a firm rule throughout Federal circuit courts, including the CAFC, that one panel cannot overrule a precedent established by an earlier panel of the same court absent a contrary opinion of the Supreme Court or the same circuit court sitting en banc. *Newell Cos., Inv. v. Kenney Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988) ("This court has adopted the rule that prior decisions of a panel of the court are binding precedent on subsequent panels unless and until overturned en banc.")[18] Since there is neither a Supreme Court nor an *en banc* decision contrary to *Federal-Mogul II*, the CAFC in this instance is bound to adhere to its own prior determination that the *Federal-Mogul* methodology was in accordance with law.

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[18] *See also, Zenith Radio Corp. v. United States*, 788 F.2d 184 (Fed. Cir. 1986), *Williams v. Ashland Eng'g Co.*, 45 F.3d 588, 592 (1st Cir. 1995); *Reich v. D.M. Sabia Co.*, 90 F.3d 854 (3d Cir. 1966); *Wilson v. Taylor*, 658 F.2d 1021, 1034 (5th Cir. 1981); *United States v. Love*, 19 F.3d 415 (8th Cir. 1994); *United Scottish Ins. Co. v. United States*, 614 F.2d 188, 191 (9th Cir. 1979); *United States v. Machado*, 804 F.2d 1537, 1543 (11th Cir. 1986); *Rose v. Silver*, 398 A.2d 310 (D.C. 1971).

III. THE CAFC'S 1995 AFFIRMANCE OF THE *FEDERAL-MOGUL* METHODOLOGY APPLIES TO COMMERCE'S FINAL DETERMINATION IN THIS CASE.

The next issue is whether the CAFC's affirmance of the *Federal-Mogul* VAT methodology in its 1995 decision in *Federal-Mogul II* applies to judicial review of the issue of the VAT methodology in this case. The answer is that it does, whether or not this is seen as a "retroactive" application.

First, when viewed from the standpoint of the controlling statutes, *Federal-Mogul II* is not being retroactively applied here. 19 U.S.C. § 1516a(a) provides for judicial review of Commerce's 1993 Final Determination. That Final Determination used the *Federal-Mogul* methodology. In 1994, the CIT in *Federal-Mogul I* found the *Federal-Mogul* methodology not in accordance with law. Later in 1994, the CIT, relying on *Federal-Mogul I*, ordered Commerce not to use the *Federal-Mogul* methodology in this case and ordered that Commerce use instead the *Torrington* methodology. Then in 1995, while this case was pending before the CAFC, the CAFC in *Federal-Mogul II* overturned the CIT's decision in *Federal-Mogul I*.

Thus, the CAFC's *Federal-Mogul II* decision was no more "retroactive" than the CIT's *Federal-Mogul I* decision. Both followed Commerce's 1993 Final Determination, and both preceded the CAFC's 1996 decision in this case. Since *Federal-Mogul II* "canceled" *Federal-Mogul I*, the CAFC should have affirmed Commerce's 1993 decision to use the *Federal-Mogul* methodology.

Even if the use of *Federal-Mogul II* were considered to be a "retroactive" application of the law, it still must be applied here. Since *Federal-Mogul II* was issued prior to the CAFC's determination in this case, it was binding precedent that should have been followed by this CAFC

panel. This Court has repeatedly ruled that it is clear error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540 (1991) ("*Beam*"); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993). Specifically, in *Beam*, this Court held that:

> when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements[19] or res judicata. *Beam*, 501 U.S. at 544.[20]

Thus, binding judicial decisions become effective the date they are issued, and all pending cases are required to follow the new interpretation, particularly if the new

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[19] In *Beam* the Court instructed that it was referring to statutes of limitation or repose when it referred to "procedural requirements." 501 U.S. at 541.

[20] Even before *Beam* it was well-settled that judicial decisions operate retroactively while congressional enactments and administrative rules generally apply prospectively. *See, United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982); *Simmons v. Lockhart*, 931 F.2d 1226, 1230 (8th Cir. 1991); *Smith v. Petra Cablevision Corp.*, 793 F. Supp. 417, 428-30 (E.D.N.Y. 1992). The CAFC followed *Beam* in *Newport News Shipbuilding & Dry Dock Co. v. Garrett*, 6 F.3d 1547, 1554 (Fed. Cir. 1993), and the reasoning in *Beam* has been universally adopted by the other Federal Circuits. *See, e.g., Bennett v. United States Lines*, 64 F.3d 62, 67 (2d Cir. 1995); *Lambert v. Genessee Hosp.*, 10 F.3d 46, 52 (2d Cir. 1993); *Graham v. IRS (In re Graham)*, 973 F.2d 1090, 1102 (3d Cir. 1992); *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703, 710 (4th Cir. 1994), *cert. denied*, 114 S. Ct. 2166 (1994); *Sterling v. Block*, 953 F.2d 198, 200 (5th Cir. 1992); *Garner v. Memphis Police Dept.*, 8 F.3d 358, 362-63 (6th Cir. 1993), *cert. denied*, 510 U.S. 1177 (1994); *Bell v. Trustees of Purdue Univ.*, 975 F.2d 422 (7th Cir. 1992); *Bottineau Farmers Elevator v. Woodward-Clyde Consultants*, 963 F.2d 1064, 1075 (8th Cir. 1992); *During v. Citibank Int'l*, 990 F.2d 1133, 1136 (9th Cir. 1993); *Olcott v. Delaware Flood Co.*, 76 F.3d 1538, 1547-48 (10th Cir. 1996); *Vance v. Southern Bell Tel. & Tel. Co.*, 983 F.2d 1573 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 1110 (1995).

judicial interpretation warrants a different result. *Id.; Hormel v. Helvering,* 312 U.S. 552, 558-59 (1941); *Vandebark v. Owens-Illinois Glass Co.,* 311 U.S. 538, 543 (1941) ("[i]ntervening and conflicting decisions will thus cause reversal of judgments which were correct when entered."); *Kinkaid v. Rusk,* 670 F.2d 737, 745 (7th Cir. 1982) (intervening appellate ruling necessitated reversal of district court); *McGhee v. Draper,* 639 F.2d 639, 654-55 (10th Cir. 1981) (same); *Key v. Rutherford,* 645 F.2d 880, 883 (10th Cir. 1981) ("absent manifest injustice, the appeals court [should] take notice of intervening decision and apply the law in effect at the time the appeal is to be decided"); *Hegger v. Green,* 646 F.2d, 22, 26 (2d Cir. 1981) (federal court sitting in diversity must apply governing state law and abide by intervening decisions handed down by state's highest court even where this results in reversal of the lower court); *Nelson v. Brunswick Corp.,* 503 F.2d 376, 381 (9th Cir. 1974) (same).

Beam refers to the three factor test for deciding whether to retroactively apply a subsequent decision that the Court had earlier described in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971). Whether, in light of the majority holding in *Beam,* the three part *Chevron* test remains necessary is not clear. If it is necessary, however, it is clear that the three *Chevron* factors are met in this case

The first *Chevron* factor is whether the decision to be applied retroactively establishes a clear new principle of law by overruling clear past precedent. Here, *Federal-Mogul II* directly overrules *Federal-Mogul I.* The second *Chevron* factor is whether retroactive application of the new decision will retard its operation. Here *Federal Mogul II* was specifically intended to return the law to what it had been prior to the CIT's issuance of *Federal-Mogul I* a year earlier. Finally, the third *Chevron* factor requires a weighing of the equities and inequities of retroactive application. "Retroactive" application of *Federal-*

Mogul II will simply here permit Commerce's use of the *Federal-Mogul* methodology in its Final Determination to be found in accordance with law. This in turn will prevent CEMEX from having higher antidumping duties assessed on its cement than is required by the antidumping statute. This is equitable for CEMEX and not inequitable for Commerce.[21]

IV. NO "WAIVER" OPERATES HERE TO PENALIZE CEMEX BY PREVENTING APPLICATION OF *FEDERAL-MOGUL II*.

In the CIT's first decision in this case it ordered that, in light of *Federal-Mogul I*, Commerce could not use the *Federal-Mogul* methodology but must use the *Torrington* methodology. At that point, the *Torrington* methodology was the law of this case. Thereafter, CEMEX argued for adjustments to the *Torrington* methodology. In its remand decision, CEMEX's argument was rejected by the CIT. A month after completion by the CIT of its phase of judicial review, the CAFC in *Federal-Mogul II* reversed *Federal-Mogul I* and upheld use of the *Federal-Mogul* methodology. Yet a year later the CAFC found CEMEX had an obligation to raise "any objection it may have had" to use of the *Torrington* methodology when the CIT deemed proper, and that, by failing to timely object, CEMEX "waived its right" to seek to return to the *Federal Mogul* methodology used in Commerce's Final Determination.

The CAFC's decision is contrary to decisions of other U.S. Circuit Courts. In *General Beverage Sales Co. v. East-Side Winery*, 568 F.2d 1147, 1152 (7th Cir. 1978),

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[21] The CAFC and CIT have repeatedly held that the purpose of the antidumping law is remedial, not punitive, in nature. *See, e.g., Badger-Powhatan v. United States*, 608 F. Supp. 653, 656, (Ct. Int'l Trade 1985); *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103 (Fed. Cir. 1990); *Nat'l Knitware & Sportsman Assoc. v. United States*, 779 F. Supp. 1364, 1373 (Ct. Int'l Trade 1991).

the Seventh Circuit held that failure to object does not bar appellate review where the applicable law had changed in the interim. In *Key v. Rutherford*, 645 F.2d 880, 882-3 (10th Cir. 1981), the Tenth Circuit reached the same result. In *Hegger v. Green*, 646 F.2d 22, 27 (2d Cir. 1981), the Second Circuit also reached the same result, noting that a holding like the CAFC's in this case would frustrate the "well-established rule" that judicial decisions are applied retroactively and would result in the application of intervening appellate decisions "only in those rare cases where counsel had the foresight to predict the change." In *Phillips v. Cameron Tool Corp.*, 950 F.2d 488, 491 (7th Cir. 1991), the Seventh Circuit noted that a holding like the CAFC's in this case would "require a party to be clairvoyant; parties need not state numerous objections to settled law in hopes that something may change while an appeal is pending. In *United States v. Scott*, 425 F.2d 55, 57-58 (9th Cir. 1970), the Ninth Circuit noted that "were we to insist that an exception be taken to save the point for appeal, the unhappy result would be that we would encourage defense counsel to burden district courts with repeated assaults on the then settled principles out of hope that those principles will be later overturned."

Finally, the Court in *Beam* provided an over-arching description of why an otherwise applicable precedent should not be denied application by barriers such as the "waiver" concept used in the CAFC's decision.

> Nor, finally, are litigants to be distinguished for choice-of-law purposes on the particular equities of their claims to prospectivity: whether they actually relied on the old rule and how they would suffer from retroactive application of the new. It is simply in the nature of precedent, as a necessary component of any system that aspires to fairness and equality, that the substantive law will not shift and spring on such a basis. . . Once retroactive application is chosen for

any asserted new rule, it is chosen for all others who might seek its prospective application. *Beam*, 501 U.S. at 544.

CONCLUSION

In order to both ensure the equitable application of controlling law in this case, and to ensure proper application of future judicial decisions, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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